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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners

v.

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INSILCO BROADCASTING CORPORATION, *et al.*,

Petitioners

v.

WNCN LISTENERS GUILD, *et al.*

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

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v.

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Petitioners

v.

WNCN LISTENERS GUILD, *et al.*

On Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF FOR INSILCO BROADCASTING CORPORATION, INSILCO BROADCASTING CORPORATION OF LOUISIANA, INC., INSILCO RADIO OF OKLAHOMA, INSILCO BROADCASTING CORPORATION OF OKLAHOMA, INC., McCLATCHY NEWSPAPERS, NEWHOUSE BROADCASTING CORPORATION, PALMER BROADCASTING COMPANY, PLOUGH BROADCASTING COMPANY, INC.

I. RESPONDENTS' ATTEMPTED EXTENSION OF *RED LION* TO COVER FORMAT REGULATION COUNTERVAILS THE FIRST AMENDMENT'S MAJOR PURPOSE

The First Amendment assumes that government is incapable of divining what speech is good for the citizenry and what is not. History shows that government is insufficiently wise for this task, and that government will abuse to its own ends any power of content selection.[1]

Respondents assert that *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), compels regulation of radio formats because of the public's paramount rights in broadcasting media.[2] Respondents, however, avoid our arguments[3] that broadcasting's unique problem of allocating scarce frequencies need not, and does not under this Court's decisions, compel an entirely separate constitutional realm from other media of expression. A governmental role in selecting broadcast licensees necessitates limiting the reach of traditional First Amendment doctrine only to a small extent.

Accommodating the need for a licensing scheme under the First Amendment has been addressed by this Court recently in *Red Lion, Columbia Broadcasting System, Inc. v. Democratic National Committee*,[4] *FCC v. National Citizens Committee for Broadcasting*[5] and *FCC v. Midwest Video Corp.*[6] These cases explain the central role of licensees' editorial discretion and the quite limited power of government to impinge upon content selection. These decisions are fundamentally incompatible with

[1] *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

[2] Respondents' Brief at 73 *et seq.*

[3] Insilco Brief at 29-41.

[4] 412 U.S. 94 (1973).

[5] 436 U.S. 775 (1978).

[6] 440 U.S. 689 (1979).

Respondents' urging that a federal agency is the proper entity to mandate basic editorial decisions about radio formats.

Respondents understandably rely on descriptive passages from *Red Lion* in isolation from its subject: the fairness doctrine and personal attack rules. Yet Mr. Justice White's opinion in *Red Lion* specifically disavowed such expansive application,[7] and indicated that approval of the fairness doctrine rested in large measure on preserving broadcasters' discretion.[8]

Respondents attack our view that "less drastic means" analysis should be applied in this case.[9] They argue that we have sought to overturn *Red Lion* and to analyze broadcasting by ignoring the "physical realities" of spectrum allocation.[10] Respondents misconstrue the point.

In our first brief we noted that principled resolution of the format issue to some extent requires reconciling *Red Lion's* holding with a wider body of First Amendment doctrine. We did not, however, dispute *Red Lion's* finding of scarce frequencies or of the need for their allocation by government.[11]

Rather, we emphasized that the uniqueness of broadcasting is not just the scarcity of frequencies—all media resources are scarce in ultimate terms—but that the nature of electromagnetic channels requires allocation by official authority instead of by economic forces or some other nongovernmental mechanism. This undisputed fact implicates decisions of this

[7] 395 U.S. at 396.

[8] *Id.*

[9] Respondents' Brief at 76-82.

[10] *Id.* at 77 n.190.

[11] Respondents' assertion that we seek to challenge *Red Lion's* rationale is therefore inaccurate. Rather, our aim has been to point out that *Red Lion* did not necessarily change the First Amendment's traditional aim of limiting governmental control over media of expression.

Court, beginning with *Hague v. CIO*, 307 U.S. 496 (1939), that limit the methods permitted government in regulating access to public forums.[12] The controlling principle is that because of the constant possibility of abuse of discretion,[13] "government . . . cannot draw distinctions between permitted and prohibited speech on the basis of speech content."[14]

In broadcasting, government abuse of the licensing process is most likely to take the form of attempts to influence news and public affairs, especially the coverage of controversial issues of public importance.[15] An administration, acting through the Commissioners it appoints, might try to install licensees who were sympathetic to official suggestions about editorial policy, or to influence existing stations by threatening to deny renewal. Under the fairness doctrine, however, these efforts would mean little, for rough balance in stations' coverage of controversial issues must result in any event.

This rationale was not discussed at the time of the fairness doctrine's creation.[16] It nevertheless provides an independent

[12] Insilco Brief at 37. *See generally* Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1288-95 (1979). Respondents cannot be taken seriously when they assert (Respondents' Brief at 78 n.193) that there is a paucity of scholarly support for the need to harmonize First Amendment theory in this area. *See, e.g.*, L. Tribe, *American Constitutional Law* 699 (1978).

[13] *See, e.g., Kunz v. New York*, 340 U.S. 290 (1951).

[14] Cass, *supra* n.12, at 1299.

[15] *See generally* National Association of Educational Broadcasters, *The Nixon Administration Public Broadcasting Papers: A Summary, 1969-1974* (1979). Certainly, in future, Congress might find that risks of abuse in licensing were no longer a sufficient reason for maintaining the fairness doctrine.

[16] The fairness doctrine took form in *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). The Commission's cursory constitutional analysis concentrated on protecting the "paramount interests of the people" by preserving "the right of the American people to listen . . . *free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.*"

(footnote continued on following page)

constitutional justification for the fairness doctrine, centering on the First Amendment's primary function of limiting governmental power over the marketplace of ideas. It is closely related as well to *Red Lion's* concern that licensees, acting by virtue of their governmentally-conferred status, might become the vicarious means of censorship.[17]

This constitutional analysis does not, however, justify government involvement in program areas beyond the scope of *Red Lion*, as Respondents have argued. The theory instead prevents government from converting the need to allocate spectrum space into the opportunity to promote certain content and to discourage the broadcast of views it deems contrary to its own (or the public's) well-being. This is precisely the danger anticipated in *Red Lion* and forestalled in *CBS v. DNC*.

II. THE FUTILITY OF GOVERNMENT EVALUATION OF PROGRAM CONTENT IS DEMONSTRABLE IN FCC DECISIONS

Respondents and Amici assert that the Commission has, over the years, successfully decided license contests by assessing which broadcast applicant would present superior programs. In

(footnote continued from prior page)

Id. at 1257 (emphasis added). The difficulty with this justification is its self-contradiction. Under the Communications Act's licensing scheme, program selection is reposed in licensees. But if neither government nor licensees can perform the function, the result is paralysis or chaos. This Court's decision in *CBS v. DNC* resolved any ambiguity about licensees' rights to exercise the editorial prerogative. 412 U.S. at 130-31.

[17] *See* 395 U.S. at 392. We speak here of censorship as a governmental function, distinguished from the private (non-governmental) task of editing. *See CBS v. DNC*, 412 U.S. at 124-25.

our first brief we demonstrated that, to the contrary, the Commission's hearing process is not even remotely suited to evaluating the relative worth of program proposals.[18]

Respondents point to the Commission's *Blue Book*[19] as an example of successful content regulation.[20] In fact, the *Blue Book* proposed gross intrusions into licensee decisionmaking and was therefore consigned to innocuous desuetude shortly after its adoption.[21] It is a monument to the intractable problem created whenever the Commission attempts to evaluate the relative worth of programming.

Amici argue that Commission hearing decisions routinely incorporate program issues.[22] They fail to mention that no such case has ever been decided solely on programming, and that the cases which attempt to evaluate programming have been

[18] Insilco Brief at 25 n.73.

[19] Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* (1946) (the "*Blue Book*").

[20] Respondents' Brief at 69.

[21] One commentator described the *Blue Book*'s fate as follows:

> The 'Blue Book' became the common name of the document because of the color of its cover and because of the tendency of the policy statement's opponents to associate it with the 'blue pencil' of censorship and/or 'blue-blooded' authoritarianism (since official documents of the British government were also called 'blue-books') . . . .
>
> . . . The 'Blue Book' was interred a few years later . . . .
>
> Neither vigorously enforced nor officially repudiated by the FCC, the very potency of the 'Blue Book' rendered it ineffectual. Its theme of balanced programming as a necessary component of broadcast service in the public interest coupled with its emphasis on a reasonable ratio of unsponsored ('sustaining') programs posed too serious a threat to the profitability of commercial radio for either the industry, Congress, or the FCC to want to match regulatory promise with performance.

F. Kahn, *Documents of American Broadcasting* 132-33 (3d ed. 1978).

[22] Brief of Amici American Symphony Orchestra, *et al.* at 16-17.

wholly unsatisfactory. For example, *WPIX, Inc.*,[23] cited by Amici,[24] was a four-to-three decision in which the Commission was bitterly[25] divided on the programming question. The majority gave the incumbent a major preference for its program record,[26] while the minority awarded "a substantial demerit, a minus of major significance."[27] *WPIX* demonstrates only that Commissioners' program analyses are highly subjective and, therefore, basically standardless.[28]

Amici also offer *Cosmopolitan Broadcasting Corp.*[29] as an example of how the Commission can resolve programming issues.[30] However, *Cosmopolitan* was decided on remand from the Court of Appeals for the District of Columbia Circuit,[31] which ordered[32] the Commission to consider programming issues according to the very precedent—*Citizens Committee to*

[23] *WPIX, Inc.*, 68 F.C.C.2d 381 (1978), *appeal pending sub nom. Forum Communications, Inc. v. FCC*, No. 78-1574 (D.C. Cir.).

[24] Brief of Amici American Symphony Orchestra, *et al.* at 17.

[25] A member of the majority, Commissioner Quello, wrote a separate opinion describing the minority opinion as "so sharply critical . . . that it amounts to a diatribe . . . ." 68 F.C.C.2d at 457. He also lamented the minority's "shrill protests," *id.* at 458.

[26] *Id.* at 400.

[27] *Id.* at 455.

[28] A number of Commissioners in *WPIX* reflected on the lack of adequate standards for comparative renewals. *See, e.g.*, the separate statement of Chairman Ferris, *id.* at 455-56. A recent analysis demonstrates the virtual impossibility of deriving adequate standards for assessing the public interest value of radio formats. Spitzer, *Radio Formats by Administrative Choice*, 47 U. Chi. L. Rev. 647 (1980). Professor Spitzer concludes that "unless one can convincingly argue for paternalistic choice of formats, unfettered licensee choice probably is preferable to *WEFM*." *Id.* at 685.

[29] 75 F.C.C.2d 423 (1980).

[30] Brief of Amici American Symphony Orchestra, *et al.* at 17.

[31] *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978).

[32] *Id.* at 931.

Preserve the Voice of Arts in Atlanta v. FCC[33] and *Citizens Committee to Save WEFM v. FCC*[34]—now at issue before this Court. Thus *Cosmopolitan* hardly demonstrates the Commission's propensity, independent of compulsion by the court of appeals, to decide license disputes in the manner suggested by the format cases.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our initial brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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October 23, 1980

[33] 436 F.2d 263 (D.C. Cir. 1970).
[34] 506 F.2d 246 (D.C. Cir. 1974) (*en banc*).